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No. 03-1084

IN THE

SUPREME COURT OF THE UNITED STATES

ELOY A. ROLE

Petitioner,

vs.

ATCO PRODUCTS INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARY TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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TOPICAL INDEX

Page

Topical Index.....i

Table Of Authorities.....ii

Related Cases And Proceedings.....1

Reasons To Grant The Petition.....1

Argument 3

I. The Court Of Appeals Improperly Affirmed The District's Court Decision To Grant Atco Leave To Amend Its Answer.....3

II. The Court Of Appeals Improperly Affirmed The Dismissal Of Petitioner's § 1985 Claims.....5

III. The Court Of Appeals Improperly Affirmed Dismissal Of Petitioner's Privacy Claims.....9

IV. The Court Of Appeals Improperly Dismissed Petitioner's ADEA Claim On The Merits.....9

V. The District Court Did Err In Its Application Of The Entire Controversy Doctrine.....11

VI. Petitioner's Claim That Atco's Counsel Made False Pleadings Is True.....13

Conclusion.....14

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Griffin v. Breckenridge,
403 U.S. 88, 102 (1971)..... 8

Paul v. Davis,
424 U.S. 693, 702, 96 S.Ct.
1155, 47 L.Ed. 2d 405 (1976)..... 9

O'Connor v. Consolidated Coin
Caterers Corp..
U.S. S.Ct. 1303.....11

MCI Telecomunications Corp., v.
Teleconcpts,
519 U.S. 815, 136 L.Ed.2d 25.....12

OTHER FEDERAL CASES

Glenside West Corp. v.
Exxon Co. U.S.A.,
761 F.Supp. 1118, 1134.....5

Planned Parenthood of
Southern Arizona v. Neely,
130 F.3d 400, 402
(9th Cir. 1997).....5

Britt v. Suckle,
453 F.Supp. 987.....6

Paton v. LaPrade,
471 F.Supp. 166 1971.....7

Kyriazy v. Western Elec. Co.,
461 F.Supp. 894 (1978).....8

Novotny v. Great American Saving Bank & Loan Assoc. et al., 584 F2d 12 (3rd Cir. 1978).....8

Allison v. City of Live Oak, 450 F.Supp. 200 (1978).....9

OTHER STATE CASES

Kopin v. Orange Products Inc., 297 N.J. Super. 353, 375 (App. Div.) certf. den. 149 N.J. 409 3

Aikens v. Schmidt, 329 N.J. Super. 335 (App. Div. 2000).....3

Brown v. Brown, 208 N.J.Super. 372, 384 506 A.2d. 29 (App.div. 1986).....4

Garrow v. Elizabeth General Hospital and Dispensary, 401 A.2d 533, 79 N.J. 549.....12

Frank v. Briel, 232 A.2d 455, 96 N.J. Super. 67.....12

STATUTES

42 U.S.C. § 1985(2).....5

42 U.S.C. § 1985(3).....5,8

29 U.S.C. § 621.....9,10

RULES

Federal Rule of Civil Procedure
15(a).....3,4

Federal Rule of Civil Procedure
15(d).....4

Federal Rule of Civil Procedure
11(b).....13

New Jersey Court Rule 4:30A.....3,4,13

New Jersey Court Rule 4:5A-4.....4

RELATED CASES AND PROCEEDINGS

There is an appeal by Petitioner waiting adjudication before the New Jersey Department of Labor, Board of Review, Docket No. 01-B-02766-000-XO.
The appeal relates to a charge of misconduct at the work place made by Respondent against Petitioner.

There is a Motion to File Judicial Notice pending adjudication before this Court.

REASONS TO GRANT THE PETITION

Petitioner Eloy A. Role's Petition for Writ of Certiorari ('Petition") should be granted.
Respondent and its Counsel(s) lost standing in the Courts including the Supreme Court when Respondent lied at the Essex County Superior Court alleging it was appealing a default judgment in favor of the Petitioner granted by the New Jersey Department of Labor Division of Wage and Hour Compliance. Respondent made appearance at the hearing via telephone.
Counsel(s) for the Respondent and Respondent itself lied at the District Court, Court of Appeals and Supreme Court when they sustained that a default judgment was granted by the New Jersey Department of Labor Division of Wage and Hour Compliance in favor of the Petitioner for the same reasons stated above.

Respondent went further in its system of lies when testifying before the Essex County Superior Court Law Division on Februry 28, 2002 asserting Petitioner was under the umbrella of an "agreement" of a union that acts at the Respondent's facilities. *See* Appendix E at page A-5 of the Petition.

Contentions by Respondent that it could amend its original Answer to the Petitioner's Complaint are baseless, the New Jersey Court Rules R. 4:30A barred Respondent of asserting an affirmative defense after it filed its original Answer. Fed. R. Civ P. 15(a) did not govern the amendment in the case at bar.

Respondent was barred of invoking N.J. Court Rule R. 4:30A, Entire Controversy Doctrine, Petitioner had and has an appeal waiting adjudication before the New Jersey Department of Labor, Board of Review, Docket No. 01-B-02766-000-XO.

Primary jurisdiction favored by the Court of the State of New Jersey and the rest of the courts barred Respondent to take Petitioner's case to the Superior Court of the State of New Jersey. Plaintiff was fired an replaced by somebody 20 years younger than him, Respondent framed itself into the provisions of the ADEA.

Respondent accused Petitioner of misconduct and negligence at work; such affirmation forms part of the conspiracy masterminded by Respondent and third party defendants already mentioned by Petitioner. Petitioner caused no damages to Respondent. Its claim of negligence was frivolous and fraudulent framing Respondent in a conspiracy and fabrication.

Respondent by the fact of disclosing Petitioner's file violated Petitioner's

constitutional rights.

I
THE COURT OF APPEAL IMPROPERLY AFFIRMED THE DISTRICT COURT'S DECISION TO GRANT ATCO LEAVE TO AMEND ITS ANSWER

The New Jersey Court Rule R. 4:30A is a State Court Rule not a Federal Rule of Civil Procedure.

The said State Court Rule, Entire Controversy Doctrine is crystal clear in the sense that being the Rule an affirmative defense, it is waived if not invoked at the original answer to a plaintiff's complaint.

Thereafter, having the State of New Jersey a Rule for joinder of claims it does not need Fed. R. Civ. P. 15(a) in order to articulate when and under which conditions an answer could be amended.

R. 4:30A barred Respondent to amend its Answer.

The Rule under the subsection 2, ¶ 2 states:

> **Construction and application, genarally.**
> Since preclusion under the entire controversy doctrine is an affirmative defense like any other preclusionary doctrine, it is waived if not timely raised. Kopin v. Orange Products, Inc., 297 N.J. Super. 353, 375 (app. Div.). certif. den. 149 N.J. 409 (1997). See also Aikens v. Schmidt, 329 N.J. Super. 335 (App. Div. 2000).

See also Brown v. Brown 208 N.J. Super. at 372, 384, 506 A.2d. 29 (App.Div.1986). R. 4:5A-4 provides in part that "[a] responsive pleading shall set forth specifically a statement of facts constituting an avoidance or affirmative defense..."[A]n affirmative defense is waived if not pleaded or otherwise timely raised." Brown v. Brown, *supra*, 208 N.J.Super. at 384, 506 A2d 29 (citing R. 4:6-7). In addition, a party's conduct can stop him/her from relying in an affirmative defense.

In the Respondent's Counsel(s) view, rules that could have been applied to amend its answer are a moving target, shifting to them according to the Counsel(s) needs.

Counsel(s) reverted to the N.J. Court Rule R. 4:30A looking for preclusionary effects, he was barred to do so by the New Jersey Court Rule mentioned, (untimely recourse of amendment), then unable to amend according to the R. 4:30A Counsel(s) reverted to the Fed. R. Civ. P. 15(a).

In a few words Counsel(s) reverted to the Rules according to their needs in detriment of Petitioner and the very same posture was predicated by the District and Appeals Courts.

In the case at bar Counsel(s) ended interposing a plain amendment under F.R.C.P. 15(d) circumventing the provisions of the Rule not without the complacency of the District and Appeals Courts.

The Brown Court, *supra* mimics Petitioner's case.

In any instance an amendment under Rule 15(d) must raise issues that arise after the initial pleadings are filed see

Glenside West Corp. v. Exxon Co. U.S.A., 761 F.Supp. 1118, 1134 (D.N.J. 1991) (citations omitted); see also Planned Parenthood of Southern Arizona v. Neely, 130 F.3d 400, 402 (9th Cir.1997).

Petitioner's citations (above),show it is not the Petitioner's case and an amendment under Rule 15(a) like the one allowed by the District Court and affirmed by the Court of Appeals was inappropriate, improcedent and biased.

II
THE COURT OF APPEAL IMPROPERLY AFFIRMED THE DISMISSAL OF PETITIONER'S § 1985 CLAIMS

Contentions by Respondent's Counsel(s) that Petitioner could have been raised 42 U.S.C. §§ 1985(2) and 1985(3) at the Essex County Superior Court Law Division are preposterous and laughable.

Petitioner introduced conclusive and substantial evidence at the District and Appeals Courts that linked Respondent with Petitioner's former employer's Counsels. Furthermore, in proceedings before the U.S.D.C., E.D.N.Y Role v. Eureka Lodge No. 434 et al. cv 00 4781 (DRH)/(ETB).

In addition, at a pre-motion conference held on January 28, 2002 at the EDNY Counsels for the Defendants in that action admitted they contacted Atco.

The issue is new or first pleaded only in the mind of Respondent's Counsel(s).

Petitioner contended that Respondent engaged in a conspiracy with former employer's Counsels directed to fabricate Petitioner's discharge and at the same time to defame Petitioner because he was attending federal proceedings in a civil rights lawsuit.
Respondent's Counsel(s)' litany of laments at p. 5, ¶ 2 of the Brief in Opposition tried in vain to obturate his Client's wound that continues bleeding reverting to the N.J. R. 4:30A, that is to say his client engagement in a class based invidious discriminatory animus raised by Petitioner in his claim before the Equal Employment Opportunity Commission and the District and Appeals Courts.

The Britt Court in Britt v. Suckle, 453 F.Supp. 987 (1978) at 992 set forth:

> "In the course of dismissing the complaint of an employee discharged from private employment solely because he had filed a voluntary petition of bankrupcy , the Court of Appeals held that in order to state a claim under § 1985(3), the alleged acts of the defendant must be illegal independently of 1985(3)."

Id. at 992:

> "Together, therefore, Griffing and McLellan provide the following standards to test the sufficiency of Plaintiff of Britt's allegations:
> (1) Statutory requirements:
> (a) Has Plaintiff alleged

that the defendant's actions are illegal independently of § 1985, as required by McLellan v. Mississipi Power & Ligh Company, *supra?*

(b) Has the plaintiff alleged "class based animus" required of § 1985(3) claimants by the Supreme Court in Griffing v. Brekenridge, *supra?*

(c) Constitutional Requirement: Does Congress have Constitutional authority to reach and prohibit the private conduct complained of in plaintiff's complaint?

In the case at bar there is a Petitioner that complained at the District and Appeals Courts that he was discriminated on the grounds of race, age and class-based animus. A Petitioner that complained and proved his discharge was fabricated in order to fabricate illegal evidence to be introduced against the Petitioner by former employer in another federal proceeding. A Petitioner that his right to work was deprived by Respondent. A Petitioner that complained that his discharge was in furtherance of conspiracy.

In Paton v. Laprade, 471 F.Supp. 166 (1971) it was said:

> "Again, I will point out that to allege "invidious", class

based discriminatory animus one need not use the word "invidious" class——based discrimination". (citatations omitted).

Reading Kyriazi v. Western Elec. Co. 461 F.Supp. 894 (1978) the Court reasoning was as follows:

"A unanimous Court of Appeals for this Circuit, sitting *in banc*, has recently held that 42 U.S.C. § 1985 (3) is available to an individual who claims to have been discriminated in retaliation for his advocacy of equal employment rights. Novotny v. Great American Federal Saving & Loan Assoc. et al., 584 F2d 1235 (3rd Cir. 1978) *(en banc)*.

Specifically, the Court held that (1) under the Supreme Court decision in Griffing v. Beckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), discrimination against woman [Hispanics] constitutes "class-based animus"; (2) that Title VII is a law which guarantees "equal privileges and immunities" within the meaning of § 1985(3); and (3) that a corporation can be deemed to have conspired with its own employees in violation of § 1985(3). The Court further noted that:

"[T]o deprive members of a class founded on gender [race] of equal protection or equal privileges and immunities without any justification is to act in an irrational and odious manner"

The last Petitioner's citation in parallel concomitance with Respondent's actions in collusion with its tool and die setter who had active participation in the job assigned to Petitioner on April 24, 2001 which Petitioner asserted was altered by Respondent in order to "fabricate" Petitioner's discharge alleging later "misconduct" on appeal actually before the N.J. DOL, Board of Review.

III
THE COURT OF APPEALS IMPROPERLY AFFIRMED DISMISSAL OF PETITIONER'S PRIVACY CLAIMS

Respondent admitted it disclosed Petitioner's personal file at the hearing held before the N.J. Department of Labor, Appeals Tribunal on September 10, 2001. The issue was pleaded by Petitioner at the District Court and Court of Appeals.

The individuals who were interested in the Petitioner's file were Counsels for Petitioner's former employer in the lawsuit at the U.S.D.C., E.D.N.Y.

See Allison v. City of Live Oak, 450 F.Supp. 200 (1978) at 204, citing Paul v. Davis, 424 U.S. 693, 702, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) where it was said that [R]eputation when coupled with loss of employment will invoke due process safeguards.

IV
THE COURT OF APPEALS IMPROPERLY DISMISSED PETITIONER'S ADEA CLAIM ON THE MERITS.

The U.S. Court of Appeals for the Third Circuit supported Petitioner's ADEA Claim. See Opinion at p. 6 an 7. At page 7, the Court of Appeals set forth Petitioner incurred in misconduct at the work place which barred his ADEA Claim.

Such an affirmation is baseless for the following reasons:

1. Respondent's claim was Petitioner mounted a piece backwards, since that Petitioner was negligent and engaged in misconduct
2. Petitioner appealed these charges before the N.J. DOL Board of Review where the appeal is waiting adjudication.

The Petitioner's rebuttal to the Court of Appeals is as follows:

A charge of negligence implies *per-se* the following components:

(a) **Duty:** Petitioner owed Respondent a legal duty of care.
During Petitioner's tenure at Atco there were no complaints documented regarding Petitioner's duty of care.
(b) **Breach of Duty:** Petitioner acted unreasonably.
Petitioner directed Atco's tool and die setter to call Petitioner to set the die, Atco's die setter destroyed Petitioner's instructions and proceeded by himself, Petitioner had lost control of his job.
(c) **Causation:** Petitioner's lack of care caused Atco harm.
Respondent never claimed Petitioner caused it any harm.
(d) **Damages:** Petitioner caused Atco economic losses, property damage, personal injury or psychological distress

In cross examination at the DOL Atco's vice president on September 10, 2001 testified it suffered no losses, no damages caused by Petitioner.

Summarizing Respondent's claim of Petitioner's misconduct was a *fraudulent representation* in which the Respondent's actions framed it in a conspiracy orchestrated by Respondent to discharge Petitioner. It was Respondent and its accomplice its tool and die setter who inverted purposely a die stripper.
The posture of the District Court and Court of Appeals in this regard needless to state, was a scandalous one. Same reasoning must be applied to the N.J. DOL Board of Review that beside of being scandalous was shameless since it still has pending an adjudication on the Petitioner's appeal, thus the Board of Review crossed the boundaries of the abuse of discretion into an area Petitioner reserves himself the right not to mention because of respect to the highest Court.
Respondent's citation of O'Connor v. Consolidated Coin Caterers Corp., U.S. 116 S.Ct. 1303 (1996) clears the way to adjudicate Petitioner's claim under the ADEA, since Petitioner's conduct during his tenure at Atco survived the tests set forth in the citation.

V
THE DISTRICT COURT DID ERR IN ITS APPLICATION OF THE ENTIRE CONTROVERSY DOCTRINE

In the State of New Jersey as well as in the rest of the States courts favor the principle of primary jurisdiction, meaning that like in the case at bar if there is an action pending adjudication before an administrative agency no court has jurisdiction to take over the matter before the agency rules in the subject matter before it. In the State of New Jersey a decision of the DOL's Board of Review must be appealed at the New Jersey Superior Court, Appellate Division.

In the case at hand Respondent's managing agent Martin Gorstein lied to the State Court acting Judge in two occasions namely, telling the Judge he was appealing a default judgment in which he made appearance and had active participation, and telling the Judge Petitioner was under the umbrella of an union "agreement" that acted in his facilities. See the District Court Opinion at p. 16 footnote 11.

It was stated in Garrow v. Elizabeth General Hospital and Dispensary, 401 A.2d 533, 79 N.J. 549 that "[i]nterruption of administrative process is not justifiable to any greater extent that interference with trial process by interlocutory appeal". Cf. Petitioner's appeal pending adjudication before the DOL, Board of Review.

Similarly, "[s]uperior Court may not usurp a function clearly delegated by the Legislature to an administrative agency". Frank v. Briel, 232 A.2d 455, 96 N.J. Super. 67. Cf. Petitioner's appeal pending adjudication before the DOL, Board of Review.

In general: MCI Telecommunications Corp. v. Teleconcepts, Inc., 71 F3d 1086, certiorari denied 117 S.Ct. 64, 519 U.S.

815, 136 L.Ed.2d 25 set forth :

"[In] contrast, when legislature provides agency with exclusive primary jurisdiction, it preempts courts' original jurisdiction over subject matter".

Cf. Petitioner's appeal pending adjudication before the DOL, Board of Review.

Petitioner's last citations tell the District Court and Court of Appeals that being Petitioner's case on appeal before the DOL Board of Review, the Essex County Superior Court Law Division had no jurisdiction to dispose or rule in the Petitioner's case.

For the foregoing reasons there are twofold arguments Petitioner can rise to erase Respondent's contentions regarding N.J. R. 4:30A. First, Respondent and his Counsel(s) lied in telling the Courts Petitioner was granted with a default judgment; Respondent Martin Gorstein made appearance to the hearing before the DOL Wage and Hour Compliance hearing held on July 19, 2001 via telephone. Second, primary jurisdiction tells the State Court it had no business with the Petitioner's case on appeal pending adjudication before the N.J. DOL, Board of Review.

VI
PETITIONER'S CLAIM THAT ATCO'S COUNSEL MADE "FALSE PLEADINGS" IS TRUE

Fed. R. Civ. P. 11(b) tells Counsel(s) for Respondent he/they had no latitude to plead frivolously. He/they

had to investigate thoroughly what his/their client did or did not do, said or did not say, ignorance of the client's conduct excuses no attorney. Therefore to thrust the idea into the Judges' minds that in the case at bar there was a default judgment in favor of the Petitioner when Respondent's managing agent Martin Gorstein made an appearance at the hearing via telephone and participated actively in it boxed Counsel(s) and his/their client(s) into the frame of perjury and obstruction of justice.

What the N.J. DOL Wage and Hour Compliance Division referee Sylvia Farley stated was that there was a default judgment in favor of the Petitioner. It is also perjury, subordination of perjury, obstruction of justice and official misconduct. It happens to be that Petitioner is suing ATCO PRODUCTS, INC., not the DOL's referee on behalf of the State of New Jersey. Petitioner had no business with the State of New Jersey. Respondent **"fabricated" a default judgment** with the DOL's referee in order to secure applicability of R. 4:30A at the N.J. Superior Court Law Division.

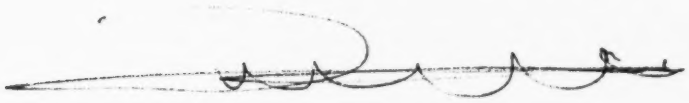
In doing so Respondent defeated the federal law abusing the state law. Respondent wrapped and kept in his pocket the New Jersey Department of Labor, Board of Review and the Wage Collection Division without any doubts.

CONCLUSION

For the foregoing reasons Petitioner, taking into consideration

Respondent's Counsels' conduct in this Court and the former ones as well as the actions of his/their client(s) asks respectfully this Court to enter judgment against Respondent(s) in the amount Petitioner asked in his Complaint or in the amount that this Court considers equitable and fair. Respondent and its Counsel(s) made a charade of the State of New Jersey and federal legal system.

Respectfully submitted



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